BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of	)	
	)	
U S WEST, INC.,	)	
Transferor,	)	
	)	
and	)	CC Docket No. 99-272
	)	
QWEST COMMUNICATIONS	)	
INTERNATIONAL, INC.,	)	
Transferee	)	
	)	
for Consent to Transfer Control	)	

COMMENTS OF
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TABLE OF CONTENTS

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OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc., and its other competitive local exchange carrier ("CLEC") affiliates (collectively "McLeodUSA"), by its attorneys, hereby files these Comments in response to the proposed Divestiture Plan of U S WEST, Inc. ("U S WEST") and Qwest Communications International, Inc. ("Qwest" and collectively the "Applicants") to discontinue Qwest's interLATA services in the U S WEST region.

I. INTRODUCTION AND SUMMARY.

Pursuant to Section 271(a), neither a BOC nor a BOC "affiliate" may provide interLATA services originating in any state within its region until it receives Commission approval pursuant to Section 271(d)(3).[1] Clearly, Qwest and its operating companies would become "affiliates" of U S WEST if the proposed merger is consummated.[2] As such, the merged entity will be statutorily prohibited from originating interLATA services in any state in U S WEST's region, except those specifically permitted under Sections 271(f) and (g).[3]

Consequently, Qwest must divest all of its in-region, interLATA services and customers upon merging with U S West. The Applicants claim that the proposed Divestiture Plan meets the requirements of Section 271(a). But when it comes to ensuring compliance with the interLATA line-of-business restrictions, paper promises are simply not enough. This principle has been well established in the context of Section 271 applications and

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1 47 U.S.C. § 271(a) & (d)(3).

2 The term "affiliate," as defined in Section 3 of the Communications Act, as amended by the 1996 Act, includes "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person." 47 U.S.C. § 153(1).

3 See 47 U.S.C. § 271(f) (permitting BOCs to continue providing in-region interLATA services that were permitted under the MFJ prior to receiving Section 271(d)(3) approval); id. at § 271(g) (permitting BOCs to provide certain narrowly tailored "incidental" in-region interLATA services prior to receiving Section 271(d)(3) approval). As used in these comments, the phrase "in-region interLATA services" refers only to those services that U S WEST is prohibited from providing prior to obtaining approval under Section 271(d)(3).

is fully applicable in a merger between a long distance carrier and a BOC that has not met the requirements for in-region interLATA approval. The Section 271 market-opening requirements are simply too important to trust that the Applicants will act against self-interest and comply fully. The Commission must therefore ensure that Qwest will actually divest its in-region, interLATA services and customers upon consummation of the proposed merger. Specifically, the Applicants must demonstrate that one or more independent and unaffiliated long distance carriers will assume complete and unqualified control over all relevant in-region interLATA customers in a manner consistent with Section 271.

But Applicants' burden of proof is not limited simply to demonstrating that they will have handed over the responsibility of transmitting in-region customer traffic to another carrier. As the Commission has held in assessing the legality of a joint marketing program between these same merging parties, a BOC's extensive involvement in aspects of the provision of long distance service other than pure transmission, such as customer care, billing and collection, and repair and maintenance, can permit the BOC to gain competitive advantages in the in-region market in violation of Section 271. Applicants must therefore also demonstrate that, when all of the terms of the divestiture are considered, the Applicants will not retain a level of involvement in providing in-region interLATA services that enables them to obtain competitive advantages in that market.

Such a showing is all the more critical given that the proposed Divestiture Plan offers many opportunities for the Applicants to retain a very significant continued role in the in-region business after the merger is consummated.[4]

II. THE COMMISSION MUST ENSURE THAT THE APPLICANTS COMPLY WITH SECTION 271(a) PRIOR TO GRANTING THE APPLICATION.

In response to petitions and comments previously filed in this proceeding, the Applicants submitted Qwest's proposed Divestiture Plan which they assert "take[s] all steps necessary to discontinue providing interLATA services in the U S WEST region, and assign all existing service obligations to one or more independent interexchange carriers."[5] Furthermore, the proposed Divestiture Plan states that, "[i]n each case Qwest's divestiture of services will be final and irrevocable, with no right for Qwest to reacquire the customers at a later point."[6] These assertions, while helpful, are not sufficient to ensure that Qwest actually fulfills the promises in its plan. The Commission must establish the means to guarantee that Qwest

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4 Of course, even if the Applicants fully demonstrate that Qwest's in-region, interLATA services will be divested to an independent, interexchange carrier in a manner consistent with Section 271, the harm to local telephony competition that will result from the proposed merger, including the likely continued decline in US WEST's service quality, compels the conclusion that the Application is contrary to the public interest. In these circumstances, grant of the Application would only be appropriate if the Commission requires that the conditions set forth in McLeodUSA's Petition to Deny be met by the Applicants.

5 Proposed Divestiture Plan, at 1.

6 _Id._

actually divests itself of those services and customers that violate Section 271(a).

Hence, the Commission must require that the Applicants make an affirmative demonstration that the arrangements it enters into pursuant to the proposed Divestiture Plan actually accomplish the objectives of the plan. Such demonstration should include proof that (1) the interexchange carrier(s) buying the customers and services from Qwest have been selected and that they are independent from and not affiliated with the Applicants, (2) the transactions are final and irrevocable upon consummation of the merger and that the Applicants will not retain any rights to reacquire the divested customers on preferential terms and conditions at a later date, and (3) the transactions fulfill the requirement that Qwest divest itself of the U S WEST in-region, interLATA services.[7]

Such an approach is completely consistent with and required by Section 271. As the Commission has stated, Section 271 reflects Congress' recognition that "unless the BOCs ha[ve] some affirmative incentive to open their local markets to competition, it would be highly unlikely that competition would develop expeditiously in the local exchange and exchange access markets."[8] In other words, the promise of long distance entry is

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[7] In addition, any "affiliate" of Qwest also must divest its in-region interLATA services upon consummation of the proposed merger. This of course includes Advanced Radio Telecom, Inc., an entity holding CLEC certification in several states in U S WEST's region, in which Qwest holds a 19 percent interest.

[8] In re AT&T v. Ameritech Corp., Qwest Communications

meant to give BOCs the incentive to open their local markets to competition as quickly as possible. If post-merger Qwest is permitted to provide in-region, interLATA services in U S WEST's region prior to fulfilling Section 271(d)(3), its incentives to open its local markets to competitors will be reduced and local competition will be slowed. Therefore, the Commission must engage a process to ensure that Qwest actually divests all its U S WEST in-region, interLATA services prior to approving the proposed merger.

Moreover, the Commission has made very clear in the related context of Section 271 applications that paper promises of compliance by BOCs are simply insufficient to meet the requirements of Section 271(d).[9] That principle is rooted in the logic of Section 271, that in-region interLATA entry must function as an incentive for BOCs to cooperate in opening the local market, and must therefore be a precondition for approval. Of course, after the merger, the Applicants would not obtain all of the freedoms that Section 271(d) approval allows. But simply trusting the Applicants to comply with Section 271 where so many opportunities for evasion exist is a virtual invitation for

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Corp. and AT&T v. US WEST Communications, Inc. and Qwest Communications Corp., 13 FCC Rcd 21438, ¶ 5 (1998) aff'd U S WEST Communications, Inc. v. FCC, No. 98-1468 (D.C. Cir. June 8, 1999) ("Qwest Teaming Order").

[9] See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543, ¶ 55 (1997).

mischief.[10] Such mischief would result in a diminution of the BOC's incentive to cooperate and would undermine Section 271.[11]

Requiring a demonstration of compliance with Section 271 as a precondition of granting the application for transfer is further supported by Section 251(g) which "requires the BOCs, both pre- and post-entry, to treat all interexchange carriers in accordance with their preexisting equal access and nondiscrimination obligations, [in order to] neutralize the potential anticompetitive impact they could have on the long distance market . . . ."[12] If Qwest does not divest all of its U S WEST in-region, interLATA services to independent interexchange carriers in a manner consistent with Section 271 prior to the merger, post-merger Qwest will have the ability to negatively impact the long distance market. This is because it will have the incentive to discriminate against competitive interexchange

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[10] This is especially true since Qwest already has shown a propensity to say one thing before the Commission, but the complete opposite to customers. For example, on September 6, 1999, Access Long Distance (a sister company to McLeodUSA) received a letter signed by a Qwest senior attorney describing as "false representations" the statements "that Qwest has begun to divest its long distance customers within the U S WEST operating region; that Qwest plans to transfer retail customers in the region to other carriers; and that Qwest will discontinue marketing its in-region calling card product." Letter of Sept. 6, 1999, to Scott F. Cate, President, Access Long Distance, from Stuart L. Crenshaw, Senior Attorney, Qwest. Yet these are essentially the same representations that are contained in the applicants' August 19, 1999 Application.

[11] The Commission must also keep in mind that it does not have the authority to forbear from enforcing Section 271. See 47 U.S.C. § 160(d).

[12] Qwest Teaming Order, at ¶ 5.

carriers. Hence, it is necessary that the Commission require the Applicants to demonstrate that all Qwest's U S WEST in-region, interLATA services are fully divested prior to granting the Application at issue here.

III. IT IS ESPECIALLY IMPORTANT TO INSIST UPON FULL COMPLIANCE WITH SECTION 271 AS A PRECONDITION TO GRANTING THE APPLICATION GIVEN THAT THE PROPOSED DIVESTITURE PLAN CONTAINS NUMEROUS OPPORTUNITIES FOR EVASION.

In deciding whether a BOC "provides" in-region, interLATA services prior to receiving Section 271 authority, the Commission considers more than simply whether the BOC has responsibility for the transmission of interLATA traffic. Rather, it reviews a BOC's activities in light of the objectives of Section 271 and whether a BOC's involvement in the long distance market, either directly or through an "affiliate," enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition.[13]

The FCC reviews the totality of a BOC's involvement to determine whether it gains competitive advantages. The factors the FCC reviews include: (1) whether a BOC obtains unique material benefits; (2) whether the BOC is effectively holding itself out as a provider of long distance service; and (3) whether the BOC is performing activities and functions that are typically performed by those who are legally and contractually responsible for providing interLATA service to the public.[14]

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13 Id. at ¶¶ 36-37.

14 Id. at ¶ 37.

Although the Applicants assert that Qwest "will irrevocably assign a new carrier (or carriers) all retail and wholesale private line voice and data services where a circuit provided to a customer crosses a U S WEST LATA boundary," the proposed Divestiture Plan holds out the possibility that the Applicants might continue to provide many of the support functions after divestiture on behalf of the Buyer.[15] These support functions include billing and collection; customer care and provisioning functions; and monitoring, trouble-shooting, maintenance, and repair. The Applicants assert that these services are not "telecommunications." Their implication is that these functions are not interLATA services restricted by Section 271(a). However, the Commission previously has reviewed these types of functions in determining whether a BOC "provides" in-region, inter-LATA services. In fact, in the Qwest Teaming Order, the Commission concluded that even though U S WEST and Ameritech were not "transmitting" long distance telephone calls, the "totality" of their involvement in marketing and the functions supporting the long distance service at issue violated Section 271(a).[16]

The same conclusion may well turn out to be warranted here. Should Qwest contract to provide all the support functions contemplated in the proposed Divestiture Plan, the following would be the result. Qwest would provide one bill and collect payments for all in-region local and interLATA services and its

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15 Proposed Divestiture Plan, at 6-11.

16 See Qwest Teaming Order, at ¶ 38.

out-of-region interLATA services. Qwest states that the carrier of the in-region, interLATA services would be identified in the bill. Nevertheless, the bill would come from and be associated with Qwest because its brand name also would be in the bill. Moreover, the prices of the new interexchange carrier would be the same as Qwest's were since Qwest would require the carrier to maintain its prices at least for some period of time.[17] Any out-of-region local service would be billed separately by the out-of-region local exchange carrier.

If a customer has problems with its in-region, interLATA services, Qwest would also be the customer care and provisioning agent. Qwest claims that it will identify the customer's interLATA service provider in all customer contacts.[18] However, when the customer calls, he or she may well hear the Qwest name and associate it with customer care before the Qwest employee is able to identify the customer's in-region, interLATA carrier. Moreover, claims by Qwest that functions will be performed by an out-of-region affiliate are beside the point since customers will still hear the Qwest name before its carrier's name is identified.

When Qwest provides trouble shooting or engages in maintenance or repair at the customer's premises, the customer could again see a Qwest employee conducting the work. The Qwest

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[17] See Proposed Divestiture Plan, at 2. As a condition of acquiring Qwest's business, the carrier will not be able to raise rates for Qwest-tariffed services for a specified interval.

[18] Id. at 9.

employee may be wearing a Qwest uniform and may arrive in a Qwest truck, thereby reinforcing to the customer that Qwest takes care of his or her problems. The totality of these functions performed by Qwest would leave customers with the impression that not much has changed post-divestiture. They would not view the independent, interexchange carrier as a new interLATA service provider meeting their telecommunications needs. Rather, they would see Qwest continuing to perform many of the functions it used to perform.

These functions, all permissible under the proposed Divestiture Plan as filed, are very similar to the functions the BOCs performed in the Qwest Teaming Order. There, U S WEST was the initial point of contact for customers' billing and collection and service inquiries, and while Qwest conducted the repair and maintenance, it had an obligation to keep U S WEST informed as to progress so that it could maintain customer care. Based on this and other considerations, the Commission found that the "only long distance function the [BOCs] do not perform . . . is the actual transmission of calls across LATA boundaries."[19] The proposed Divestiture Plan seems to offer the possibility that the same would be true here.

Moreover, through performance of these functions, Qwest would obtain unique material benefits. It would be able to continue to strengthen its brand name as associated with the

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[19] Qwest Teaming Order, at ¶ 48.

provision of in-region, interLATA services. Those customers that will be divested by Qwest in U S WEST's region already associate goodwill with Qwest. By permitting Qwest to continue to provide all the proposed functions to support in-region, interLATA services transmitted by other interexchange carriers, Qwest would be reinforcing its position in the market. The functions give it the opportunity to strengthen and entrench its relationships with in-region customers.[20] Indeed, once it obtains Section 271 authority to provide in-region, interLATA services, Qwest would have a significant "jumpstart" to regain those divested customers.[21] Finally, Qwest's brand name will be associated with all the functions of providing in-region, interLATA service that the customer actually sees.

Similarly, the proposed Divestiture Plan indicates that Qwest may continue to be engaged in calling card, prepaid card, and operator services activities on a contract basis which could well raise Section 271 compliance issues, particularly when considered in light of the "totality" of Qwest's ongoing involvement in activities relating to the provision of in-region interLATA services post-divestiture.[22] In this regard, the Divestiture Plan specifically states that Qwest expects to market pre-paid cards and post-paid calling card services which can be utilized to purchase in-region interLATA services, with Qwest

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20 See id. at ¶ 40.

21 Id. at ¶ 41.

22 See Proposed Divestiture Plan at 12-14.

acting as an "agent" of the Buyer, even after the proposed divestiture.[23] Pre-paid and post-paid cards will apparently still be marketed under the Qwest brand, notwithstanding their continued use for in-region interLATA calling. In addition, the Divestiture Plan provides that the buyer "may contract with Qwest to license use of Qwest's proprietary calling card platform and to receive customer care and billing support functions from Qwest."[24] Moreover, the buyer's pricing structure and other related aspects of its provision of prepaid and post-paid cards and operator services will be constrained by the terms previously established by Qwest for an unspecified period following the proposed divestiture.[25]

On the basis of the information provided in the proposed Divestiture Plan, it remains far from clear that Qwest's ongoing involvement in card-related marketing, customer care, billing, and other support functions will be consistent with the limitations imposed under Section 271 and the Commission's prior orders. In the AT&T Corp. v. BellSouth Corp. complaint order

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[23] Id. at 12-13. The proposed Divestiture Plan does not indicate whether or to what extent Qwest may continue to provide marketing assistance or other support services for the purchaser of its in-region, interLATA operator services business, but does not specifically foreclose such involvement. In this regard, the Divestiture Plan merely states that Qwest will "discontinue handling operator-assisted in-region interLATA calls using 0+, 0-, 101-XXXX and similar dialing patterns" and that the new carrier "will be responsible for obtaining its own telecommunications network facilities to handle these calls." Id. at 13.

[24] Id. at 12.

[25] Id. at 12-13.

cited in the proposed Divestiture Plan, the Common Carrier Bureau emphasized that it was not approving the lawfulness under Section 271 of any other BOC's calling card offerings.[26] The BellSouth Order also makes clear that such cases "must be decided, as here, on the facts of the particular offerings. . . ."[27]

In this instance, the proposed Divestiture Plan would allow a BOC affiliate (i.e., Qwest) to engage in marketing, customer care, billing and other support activities associated with the provision of in-region, interLATA services provided through the use of Qwest-brand calling cards and pre-paid cards. In contrast, the BellSouth Order involved an arrangement under which the independent interexchange carrier (U.S. South), not BellSouth itself or a BellSouth affiliate, provided call assistance and customer care for in-region, interLATA calls completed using BellSouth's prepaid card.[28] The Bureau found this fact to be particularly significant in its analysis of the lawfulness of BellSouth's arrangement under Section 271.[29]

The BellSouth Order also emphasized that "[BellSouth's] local market position [was] not used to market or sell the Card," and noted that if the offering had been structured to take

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[26] AT&T Corp. v. BellSouth Corp., 15 Comm. Reg. 634, at ¶ 31, n.73 (C.C.B. 1999) ("BellSouth Order"). Indeed, the Bureau noted in its Order that complaints with respect to other BOC card offerings were still pending before the Commission. Id.

[27] Id.

[28] Id. at ¶ 9.

[29] Id. at ¶¶ 26, 36.

advantage of BellSouth's local market dominance, the offering might well have been found to be in violation of Section 271.[30] The proposed Divestiture Plan does not rule out the possibility that local U S WEST customer service or billing information and support capabilities may be employed by Qwest in performing marketing, customer service, or billing functions for in-region, interLATA calls post-divestiture. Nor does it foreclose the possibility that Qwest may collect customer information, in performing such functions pursuant to its "agency" arrangement, that may be immediately useful to Qwest and/or U S WEST in marketing local and intraLATA toll services, and provide a "head-start" to the merged entity in its efforts to build a base of in-region, interLATA service customers which can be more fully exploited once full interLATA authority is obtained.[31]

All of this goes to show that the risk that divestiture will not be conducted in a manner that fully complies with the requirements of Section 271 is far from theoretical. U S WEST and Qwest have already tried to evade the requirements of Section 271 in their "Buyer's Advantage" joint marketing program that the Commission's struck down in the Qwest Teaming Order. That program was a blatant case of a BOC taking the approach of "shoot

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30 Id. at ¶ 26 (emphasis added).

31 In its BellSouth Order, the Bureau noted that if a BOC were to market a card in a way that "entrenched [the BOC's] local market share or effectively pre-positioned itself in the long distance market," that might well lead to a finding that the offering violated Section 271. Id. at ¶ 27 (emphasis added).

now and ask questions later." U S WEST should not be allowed to do the same again here.

IV. CONCLUSION

For the reasons described herein, the Commission must ensure that the Applicants demonstrate that they will be fully compliant with the requirements of Section 271 post-merger as a necessary condition precedent to any grant of the applications for transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 26th day of October, 1999, copies of the foregoing Comments Of McLeodUSA Telecommunications Services, Inc. were delivered by hand, unless otherwise indicated, to the following parties:

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